

E-Filed 3/16/10

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ERIKA CANAS, JOSE CANAS, a minor, by and through his guardian ad litem, and JESUS CANAS, a minor, by and through his guardian ad litem,

Plaintiffs,

V.

CITY OF SUNNYVALE, CHRIS SEARLE,
DARREN PANG and DOES ONE through
TWENTY-FIVE,

Defendants.

Case Number C 08-5771 JF (PVT)

**ORDER¹ GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS, WITH LEAVE TO
AMEND IN PART**

[re: document no. 42]

This action arises from the allegedly wrongful shooting death of Jose Francisco Canas (“the Decedent”) by public safety officers of the City of Sunnyvale on September 12, 2007. Defendants City of Sunnyvale (“the City”) and officers Chris Searle (“Searle”) and Darren Pang (“Pang”) (collectively, “Defendants”) move to dismiss three claims in the Third Amended Complaint (“TAC”) filed by the Decedent’s wife, Erika Canas, and his two children, Jose and Jesus Canas (collectively, “Plaintiffs”). The Court has considered the complaint and attached

¹ This disposition is not designated for publication in the official reports.

1 exhibits, the moving and responding papers, and the arguments of counsel presented at the
2 hearing on March 12, 2010. For the following reasons, Defendants' motion will be granted in
3 part and denied in part, with leave to amend in part.

4 **I. FACTUAL BACKGROUND**

5 Plaintiffs allege that at approximately noon on September 12, 2007, the Decedent left the
6 apartment he shared with Plaintiffs with the intent to drive to work. (TAC ¶ 17.) They further
7 allege that after the Decedent walked to his car (which was parked next to the curb outside the
8 apartment), entered the car, buckled his seatbelt, started the car, and placed it in gear, he was shot
9 in the head by the defendant officers. (*Id.*) Plaintiffs allege that, prior to the shooting, the
10 defendant officers had approached the Decedent in an unmarked car dressed in street clothes and
11 "did not adequately identify themselves or their instructions." (*Id.*) They further allege that the
12 Decedent was "shot from an angle behind his car," that the defendant officers were not in front of
13 the Decedent's car when he was shot, and that the Decedent "was not accelerating his car in any
14 unusual manner, but instead rolling forward slightly or not at all, and his car was still located
15 adjacent to the curb." (*Id.*) Plaintiffs allege that the Decedent was unarmed, did not resist the
16 officers, communicate with them verbally or physically, or otherwise act in any manner to induce
17 the officers to use deadly force. (*Id.*)

18 Plaintiffs allege that "[a]t the time of the shooting of [the] Decedent . . . , [the officer
19 defendants] were attempting to make an arrest of [the] Decedent . . . , seize him and search his
20 property" pursuant to a warrant they had obtained earlier. (TAC ¶ 28.) They allege further that
21 in obtaining the warrant, the officers "used falsified evidence, made material misrepresentations,
22 and withheld material exculpatory information from the magistrate who issued the warrant."
23 (TAC ¶ 30.) The warrant apparently arose from the stabbing death of Pablo Rosales, and
24 Plaintiffs allege that the officers "fail[ed] to advise the magistrate that evidence existed that Jose
25 Canas was not involved in the beating and stabbing of the victim." (*Id.*) They also allege that
26 the officers failed to disclose that "the principal charging witness was not credible, and had
27 provided inconsistent statements and changed his statement at the instigation of Defendants Chris
28 Searle and Darren Pang, and that there was no credible evidence that Jose Canas was a gang

1 member despite representations that he was a gang member.” (*Id.*) Finally, Plaintiffs allege that
2 the officers were acting pursuant to policies or practices of the City of Sunnyvale, and that the
3 City failed adequately to train the officers to perform the particular duties they were discharging
4 at the time they allegedly shot the decedent.

5 **II. PROCEDURAL BACKGROUND**

6 On December 26, 2007, Plaintiffs submitted administrative claims to the City pursuant to
7 California Government Code § 945.4. The City rejected the claims on May 28, 2008, prompting
8 Plaintiffs to file a complaint five days later in the Santa Clara Superior Court. Defendants
9 removed the action to this Court and moved for dismissal for failure to state a claim upon which
10 relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). On November 19, 2008, Plaintiffs
11 voluntarily dismissed the complaint without prejudice, subsequently filing a second action in
12 state court. Defendants again removed the action to this Court and again moved to dismiss
13 pursuant to Rule 12(b)(6). In response to that motion, Plaintiffs filed an amended pleading
14 containing claims for negligence, negligent infliction of emotional distress, and civil rights
15 violations.

16 Defendants again moved to dismiss, and a hearing on their motion was held on May 1,
17 2009. As a result of a misunderstanding, Plaintiffs filed their Second Amended Complaint
18 (“SAC”) on May 11, 2009, before the Court had issued an order on the motion. In that order,
19 which was issued on May 13, 2009, the Court identified several pleading deficiencies and
20 concluded that Plaintiffs had failed to state any claim upon which relief might be granted.
21 However, because it seemed likely that Plaintiffs could state a viable claim, the Court granted
22 leave to amend. Plaintiffs elected to treat the complaint filed on May 11 as their operative
23 pleading. Defendants then filed a third motion to dismiss on June 1, 2009. In an order dated July
24 20, 2009, the Court again granted Defendants’ motion with leave to amend “[b]ecause [the
25 Plaintiffs’] well-pled allegations [were] insufficient to state any claim upon which relief may be
26 granted,” but noted that “[s]hould Plaintiffs allege th[e] underlying conduct [common to each
27 claim] in greater detail, their individual claims might well prove legally sufficient.” (Doc. No.
28 38, at 6-7.)

On August 19, 2009, Plaintiffs filed the operative Third Amended Complaint alleging the following five claims: (1) negligence, against the officers; (2) respondeat superior liability against the City for the officers' negligence; (3) negligent training or supervision against the City; (4) civil rights violations pursuant to 42 U.S.C. § 1983, for denial of substantive due process; and (5) civil rights violations pursuant to 42 U.S.C. § 1983, for unreasonable search and seizure and excessive force in violation of the Fourth Amendment. Plaintiffs also allege that the City is liable under *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690-94 (1978) for maintaining one or more policies, practices, or customs that caused the claimed constitutional violations.

Defendants filed the instant motion to dismiss Plaintiff's third, fourth, and fifth claims on September 8, 2009.

III. LEGAL STANDARD

Dismissal under Fed. R. Civ. P. 12(b)(6) “is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to dismiss, the plaintiff’s allegations are taken as true, and the court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). At the same time, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Thus, a court need not accept as true conclusory allegations, unreasonable inferences, legal characterizations, or unwarranted deductions of fact contained in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994).

As the Supreme Court recently has clarified, a court must determine whether the well-pleaded facts in the complaint “*plausibly* give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. —, 129 S.Ct. 1937, 1950 (2009) (emphasis added). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has

1 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (quoting Fed. R. Civ.
2 P. 8(a)(2)).

3 Leave to amend must be granted unless it is clear that the complaint’s deficiencies cannot
4 be cured by amendment. *Lucas v. Dep’t of Corrs.*, 66 F.3d 245, 248 (9th Cir. 1995). When
5 amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*,
6 90 F.3d 386, 393 (9th Cir. 1996).

7 IV. DISCUSSION

8 A. Plaintiffs’ Third Claim: Negligent Training or Supervision by the City

9 Plaintiffs’ third claim alleges that the City’s negligent failure to train and/or supervise the
10 defendant officers was a proximate cause of Decedent’s death. (TAC ¶¶ 23-25.) The allegations
11 in support of this claim are substantively the same with respect to the City as Plaintiffs’
12 allegations in the First Amended Complaint (“FAC”) in support of their negligence claim. (*Cf.*
13 FAC ¶ 16 (“Defendant City of Sunnyvale failed to properly select, retain, train, discipline, and
14 supervise Chris Searle and Darren Pang . . . in the proper use of arrest, and search and seizure
15 procedures, use of firearms and use of lethal force, the proper manner of investigation of crimes
16 and making of arrests, and to act as reasonably prudent police officers, as well as the failure to
17 enact procedures and policies guiding law enforcement officers “in the handling of critical
18 incidents[”.”]) with TAC ¶ 24 (“Notwithstanding the knowledge that Defendants Chris Searle
19 and Darren Pang, and each of them, were neither qualified nor able to safely serve an arrest
20 warrant upon suspected felons, Defendant City of Sunnyvale did not adequately train or
21 supervise Defendants Chris Searle and Darren Pang . . . in his/their use of force, in the
22 constitutional limits of the use of force, and investigation and arrest procedures.”).)

23 In granting Defendants’ motion to dismiss the negligence claim alleged in the FAC, the
24 Court wrote:

25 “A public entity is liable for injury proximately caused by an act or
26 omission of an employee of the public entity within the scope of his employment
27 if the act or omission would, apart from this section, have given rise to a cause of
action against that employee or his personal representative.” Cal. Gov’t Code §
28 815.2. Both the FAC and the Plaintiff’s Government Code claims set forth facts
and arguments in support of their claim that Decedent’s death was caused by
Defendants’ negligence. Plaintiffs allege specifically that the City negligently

1 failed to train the officers on the “use of firearms and . . . lethal force, and the
2 proper manner of . . . making arrests . . . as reasonably prudent police officers”
3 and that the officers negligently failed to perform these duties. FAC ¶16.
4 However, neither the FAC nor the Government Code claims identifies a *specific*
5 *statute that gives rise to a cognizable cause of action under California law;*
6 Plaintiffs must address this deficiency and in any amended pleading.

7 (Doc. No. 29, at 3 (emphasis added).) As Defendants argue, this analysis equally applies to
8 Plaintiffs’ third claim in the TAC.

9 Plaintiffs contend that they identified a specific statute to support their claim,
10 Government Code § 815.2, in their SAC. Notwithstanding the fact that the SAC is not the
11 operative complaint and that the TAC does not contain this allegation, Plaintiffs again fail to
12 recognize that Section 815.2 requires explicitly that claims be supported by statutes “*apart from*
13 *this section.*” Cal. Gov’t Code § 815.2 (emphasis added.).

14 In a footnote, Defendants also contend that even if Plaintiffs were able to find support in a
15 specific statute, their third claim “is barred by their failure to file a timely tort claim for a
16 negligent training and supervision claim” under Government Code § 945.4 (Defs.’ Mot. to
17 Dismiss (“MTD”) 7 n.2 (citing Doc. No. 29, at 3:15-17).) As the Court stated in granting
18 Defendants’ motion to dismiss the FAC with respect to Plaintiffs’ claim for negligent infliction
19 of emotional distress, “California Government Code § 945.4 requires presentation of claims to a
20 public entity prior to initiation of a suit in court. . . . Defendants point out correctly that
21 Plaintiffs’ claim for negligent infliction of emotional distress was not included in the
22 administrative claim filed by Plaintiffs on December 26, 2007.” (Doc. 29, at 3.) Defendants
23 contend that Plaintiffs’ claims failed to allege that the City negligently failed to train or supervise
24 the officer defendants. Defendants are correct. (See TAC, Ex. A, at Attachment A
25 (administrative claim allegations that the *officers’* actions in shooting Decedent on the City’s
26 behalf were “negligent or otherwise such that liability was incurred”)).² Because this failure

27 ²Plaintiffs’ argument that they “substantially complied” with Section 945.4 with respect
28 to their negligent training or supervision claim is unavailing. While the allegations in the
administrative claims address the officers’ negligence and the City’s potential liability for that
negligence, they make no mention of failure to train or supervise, or any other theory of direct

1 cannot be remedied through amendment, Plaintiffs' third claim will be dismissed without leave
2 to amend.

3 **B. Plaintiffs' Fourth Claim: Section 1983 Liability for Violation of Substantive Due
4 Process**

5 **1. Failure to Establish Municipal Liability**

6 Municipalities "may be liable under § 1983 when the allegedly unconstitutional act stems
7 from a municipal policy, decision or custom." *Del Conte v. San Francisco Police Dep't*, 2009
8 WL 2871052 *2 (N.D. Cal. Sept. 1, 2009) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658,
9 690-91 (1978)). Defendants argue that the Plaintiffs' fourth claim fails as to the City because the
10 TAC "contains no facts showing *both* a violation of constitutional rights *and* that the violation
11 was the result of an official policy, pattern, or practice of the City." (MTD 10 (emphasis in
12 original).)

13 Plaintiffs contend that their references to the City's "policies and procedures" in
14 Paragraphs 10 and 11 of the TAC are sufficient to establish municipal liability under the *Monell*
15 line of cases. Paragraphs 10 and 11 contain identical language but for the individual officers'
16 names:

17 Defendant [Chris Searle/Darren Pang] is an individual, and at all times mentioned
18 herein, an employee/agent and deputy officer of Defendant the City of Sunnyvale
19 including its "Sunnyvale Police Department," and acting within the scope of his
employment/agency. Defendant [Chris Searle/Darren Pang], all times mentioned
20 herein, under the policies and procedures of the Sunnyvale Police Department was
armed, and charged with the task(s) of investigation and arrest of suspected
criminals, including suspected felons and/or fleeing suspected felons.

21 (TAC ¶¶ 10, 11.)

22 While these allegations might have been sufficient in the *pre-Iqbal* era, they fall short of
23 the *Iqbal* standard with respect to a claim that the alleged Section 1983 violation occurred *as a*
24 *result of* the City's policies and procedures. At most, Plaintiffs allege that the City's policies and
25

26 liability for the City. *See Connelly v. County of Fresno*, 146 Cal. App. 4th 29, 38 (Cal. Ct. App.
27 2006) ("The doctrine of substantial compliance . . . 'cannot cure total omission of an essential
28 element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute.'")

1 procedures caused the defendant officers to be armed on September 12, 2007, and established
2 that the officers' duties included the investigation and arrest of suspected criminals. Leave to
3 amend to allege facts sufficient to establish municipal liability will be granted, consistent with
4 the requirements of Fed. R. Civ. Pro. 11.

5 **2. Failure to State a Claim for Violation of the Fourteenth Amendment on the**
6 **Decedent's Behalf**

7 Plaintiffs' fourth claim is based upon the facts surrounding the procurement of the
8 warrant and the shooting death of the Decedent and alleges that the defendant officers' actions
9 deprived *the Decedent* of "due process; . . . freedom from the use of excessive and unreasonable
10 force during seizure; freedom of summary punishment; . . . [and] life without due process,"
11 caused the Decedent "to be subjected to cruel and unusual punishment," and deprived "Plaintiff
12 [sic] of the familial relationship with the decedent." (TAC ¶ 32.)

13 Defendants contend that while the allegations in the TAC might support a *Fourth*
14 Amendment claim on the Decedent's behalf, they do not support a *Fourteenth* Amendment claim
15 for violation of substantive due process. They point to Supreme Court's statement in *Albright v.*
16 *Oliver* that "[w]here a particular Amendment 'provides textual source of constitutional
17 protection' against a particular sort of governmental behavior, 'that Amendment, not the more
18 generalized notion of "substantive due process," must be the guide for analyzing these claims.'" 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Defendants argue that the Fourth Amendment "provides an explicit
21 textual source of constitutional protection for pretrial deprivations of liberty." (MTD 7.)

22 Plaintiffs do not address Defendants' arguments directly. They first point to the Court's
23 earlier comment that they "may be able to assert a Fourteenth Amendment substantive due
24 process claim." (Doc. No. 29, at 4.) Although the Court indeed has recognized that possibility,
25 Plaintiffs have not done so here. While Plaintiffs are correct that "survivors of a person killed by
26 law enforcement officers, including parents and children, may assert a Fourteenth Amendment
27 substantive due process claim based on the relative deprivation of *their* liberty arising out of *their*
28

1 relationship with the decedent," (Pls.' Opp'n 14 (emphasis added)), their fourth claim as
2 currently framed alleges violations of the *Decedent's* due process rights. As Defendants observe,
3 these allegations stem from the alleged attempted search and seizure of the Decedent by the
4 defendant officers and are appropriately analyzed under the Fourth Amendment, not the
5 Fourteenth. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (holding that
6 substantive due process analysis applied because no Fourth Amendment seizure took place where
7 there was no "governmental termination of freedom of movement *through means intentionally*
8 *applied*" (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in
9 original))).

10 The single allegation in support of the fourth claim that pertains to violations of the
11 *Plaintiffs'* due process rights is that "the actions of Defendants include . . . deprivation of
12 Plaintiff [sic] of the familial relationship with the defendant." (TAC ¶ 32.) This bare statement
13 is insufficient to meet the plausibility standard of *Iqbal*. In addition, though the Plaintiffs
14 contend in their opposition that they "have asserted a claim based upon the 'loss of society,
15 comfort, attention, services, and support' as a result of the untimely and violent death of Mr.
16 Canas," this language comes from Paragraph 18 in support of Plaintiffs' first claim and neither
17 appears in nor is incorporated by reference into their fourth claim. Leave to amend to allege facts
18 sufficient to support a Fourteenth Amendment claim based on deprivation or violation of
19 *Plaintiffs'* due process rights will be granted.

20 **C. Plaintiffs' Fifth Claim: Section 1983 Liability for Violation of Fourth Amendment**

21 **1. Failure to Establish Municipal Liability**

22 Plaintiffs' fifth claim as to the City is insufficient for the reasons discussed in Section
23 IV.B.1, above.

24 **2. Failure to State a Claim for Violation of the Fourth Amendment on the
25 Plaintiffs' Behalf**

26 Plaintiffs' fifth claim as to the defendant officers is based entirely on the officers' alleged
27 use of excessive force upon and unreasonable attempted search and seizure of the Decedent.
28

1 Defendants contend that even if true, the allegations establish a violation of the *Decedent's*
2 Fourth Amendment rights and not Plaintiffs'. They point to the Ninth Circuit's holding in
3 *Moreland v. Las Vegas Metropolitan Police Department* that "the general rule is that only the
4 person whose Fourth Amendment rights were violated can sue to vindicate those rights." 159
5 F.3d 365, 369 (9th Cir. 1998) (citation omitted). As Plaintiffs' point out, however, the *Moreland*
6 court also noted that "[i]n § 1983 actions . . . the survivors of an individual killed as a result of an
7 officer's excessive use of force may assert a Fourth Amendment claim on that individual's behalf
8 if the relevant state's law authorizes a survival action." *Id.* (citing 42 U.S.C. § 1988(a)).³

9 Plaintiffs have met their burden at the pleading stage. California law allows for
10 survival actions. Cal. Code Civ. Proc. § 377.30 ("A cause of action that survives the death of the
11 person entitled to commence an action or proceeding passes to the decedent's successor in
12 interest . . . and an action may be commenced by the decedent's personal representative or, if
13 none, by the decedent's successor in interest."). In Paragraph 35 of the TAC, Plaintiffs allege
14 that they meet the requirements of Section 377.30, as well as Section 377.32, which lists the
15 information a proposed successor in interest must provide in an affidavit before commencing a
16 survival action:

17 Plaintiff Erika Canas is the surviving wife of Decedent Jose Francisco
18 Canas. Plaintiffs Jose Canas and Jesus Canas, and each of them, are the sole
19 surviving children of Decedent Jose Francisco Canas. Plaintiffs Erika Canas, Jose
20 Canas, by and through his guardian ad litem, and Jesus Canas, by and through his
21 guardian ad litem, are successors in interest of Decedent Jose Francisco Canas and
22 succeed to this cause of action because there is no personal representative of the
estate of Jose Francisco Canas. Plaintiffs, and each of them, bring this complaint
in the capacity of successors in interest. Plaintiff Erika Canas, individually, and
as guardian ad litem of Plaintiff Jose Canas and Jesus Canas, has executed and
filed a declaration under penalty of perjury as required by Code of Civil Procedure
Section 377.32.

23 TAC ¶ 35. Accordingly, Defendants' motion to dismiss Plaintiffs' fifth claim as to the defendant

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27 ³In *Moreland*, the Ninth Circuit affirmed the district court's ruling that the plaintiffs did
28 not meet their burden of demonstrating that they met the requirements for bringing a survival
action under Nevada law. *Moreland*, 159 F.3d at 369-70.

1 officers will be denied.⁴

2 **V. CONCLUSION**

3 For the foregoing reasons, Defendants' motion to dismiss is GRANTED IN PART AND
4 DENIED IN PART, with leave to amend in part. Any amended complaint shall be filed within
5 thirty (30) days of the date this order is filed. The case management conference is rescheduled
6 for May 14, 2010, at 10:30 A.M.

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8 **IT IS SO ORDERED**

9 DATED: 3/16/09

10 
11 JAMES FOGEL
United States District Judge

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19 ⁴Because the survival action is brought on behalf of the Decedent, Plaintiffs are not
20 entitled to compensatory damages as alleged in Paragraph 41 of the TAC. *Cf. Quiroz v. Seventh
Ave. Ctr.*, 140 Cal. App. 4th 1256, 1264-65 (Cal. Ct. App. 2006) (“In the typical survivor action,
21 the damages recoverable by a personal representative or successor in interest on a decedent's
cause of action are limited by statute to “the loss or damage that the decedent sustained or
22 incurred before death, including any penalties or punitive or exemplary damages that the
decedent would have been entitled to recover had the decedent lived, and *do not* include damages
23 for pain, suffering, or disfigurement.” (quoting Cal. Code Civ. Proc., § 377.34 (emphasis
added))) *with id.* at 1264 (“A plaintiff in a wrongful death action is entitled to recover damages
24 for his own pecuniary loss, which may include (1) the loss of the decedent's financial support,
services, training and advice, and (2) the pecuniary value of the decedent's society and
25 companionship—but he may not recover for such things as the grief or sorrow attendant upon the
death of a loved one, or for his sad emotions, or for the sentimental value of the loss.”” (citing
26 *Nelson v. County of Los Angeles*, 113 Cal. App. 4th 783, 793 (Cal. Ct. App. 2003); Cal. Code
27 Civ. Proc. § 377.61.) (footnote omitted). Plaintiffs should correct their fifth claim as to the
officers in this respect.